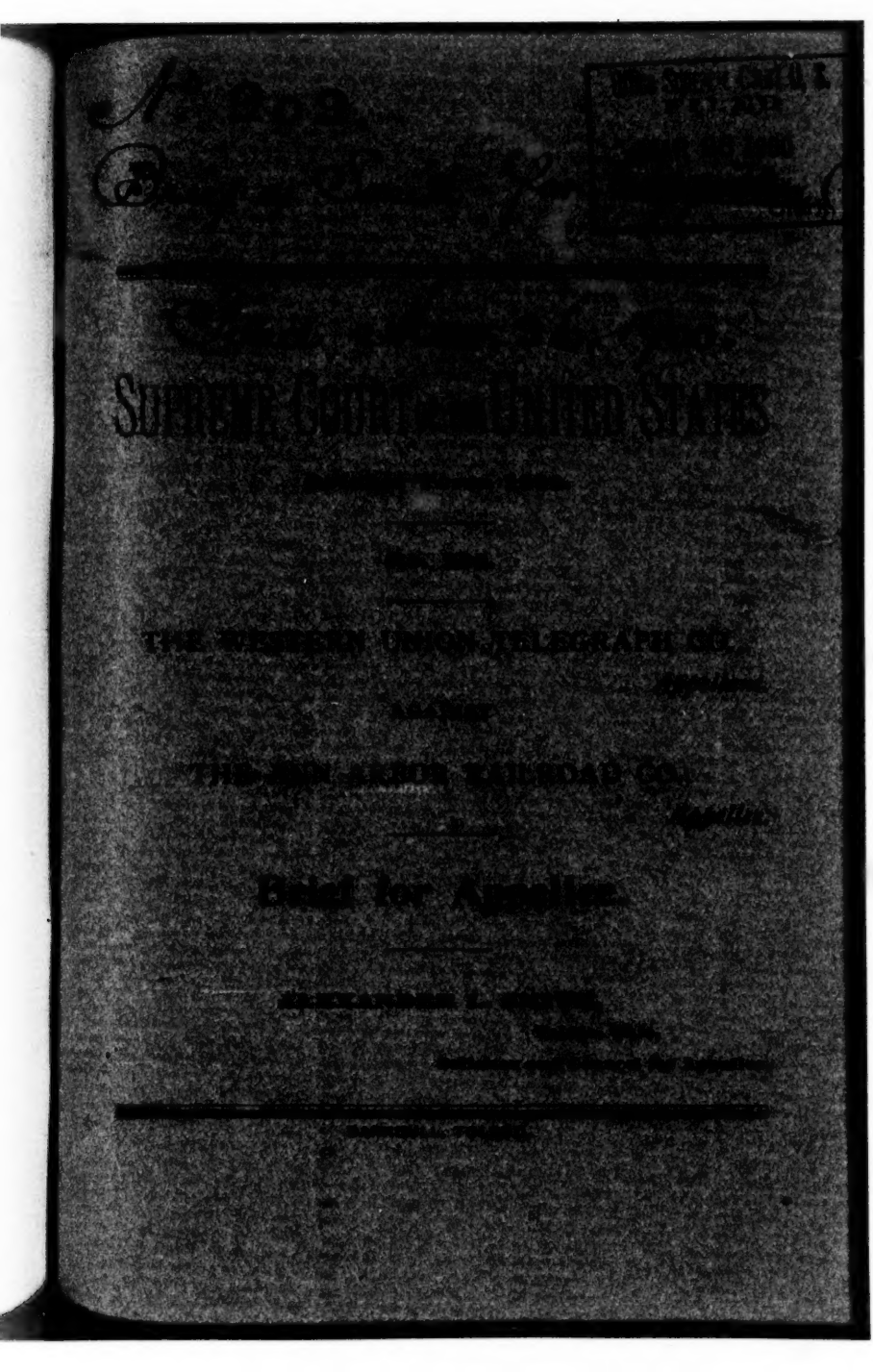

IN THE

SUPREME COURT OF THE UNITED STATES

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant.

vs.

THE ANN ARBOR RAILROAD COMPANY,
Appellee.

BRIEF FOR DEFENDANT AND APPELLEE.

I. The bill of complaint in this case was in effect a bill for the specific performance of a contract entered into September 25, 1890, between The Western Union Telegraph Company and The Frankfort & South Eastern Railroad Company, providing for the construction, maintenance and operation of a line of telegraph between Frankfort and Copemish, the termini of the railroad, then operated by the Frankfort & Southeastern Railroad Company. At the time of the execution of this contract there was a mortgage upon the property of the railroad company to secure an issue of bonds amounting to two hundred and thirty-five thousand dollars ($235,000). This mortgage was subsequently (in 1895) foreclosed by judicial proceedings in the Circuit Court of the United States for the Western District of Michigan, Southern Division, and the property was sold at judicial

sale to a representative of the bondholders, who thereupon conveyed the same to the defendant, The Ann Arbor Railroad Company.

The defendant claimed that it was not bound by the contract in question and before taking possession of the railroad property, notified the plaintiff in writing that it was not bound by the contract and would not operate under it. On taking possession of the railroad property the defendant took possession of the telegraph line between Thompsonville (near Copemish) and Frankfort and disconnected it from the lines of the Western Union Telegraph Company. Shortly thereafter the telegraph company established a re-connection by force and filed its bill in this case procuring a preliminary injunction at the time of the beginning of the suit. It was claimed in the original bill that independently of said contract complainant has a right to maintain and operate its line over the property of the railroad company under the provisions of the statute of July 24, 1886. But this statute does not confer any right upon the telegraph company to go on the property of a railroad company except by agreement or condemnation. Indeed Congress could not confer such a right.

See—

Telegraph Co. vs. Telegraph Co., 96 U. S. 1-11-13.

In this case the Court say, speaking of the Act: "It gives no foreign corporation the right to enter upon private property, without the consent of the owner, and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupa-

tion of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

Again,—"No question arises as to the authority of Congress to provide for the appropriafion of private property to the uses of the telegraph, for no such attempt has been made * * * If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized."

It is not, we suppose, now seriously claimed by counsel for appellant that the Telegraph Company has the right, under the statute and independently of the contract, to maintain and operate its telegraph line over the railway Company's property.

But we suggest that *this is the only question open for consideration in this Court.* The case was removed to the Federal from the State Court on the ground that this Federal question was involved. Had the jurisdiction of the Federal Court depended merely on diverse citizenship, the jurisdiction of the Circuit Court of Appeals would have been final. The only authority for invoking the jurisdiction of this Court arises from the fact that the suit involved a Federal question. And we suggest that the appellate jurisdiction of this Court is confined to a consideration and determination of that question.

In the case of Horner vs. United States, No. 2, 143 U. S. Reports, p. 570, it was held that on an appeal from the Circuit Court under that clause of section five of the act of March 3rd, 1891, which gives such appeal "in any case in which the constitutionality of any law of the United States * * * is drawn in question," this

Court acquired jurisdiction of the entire case and all questions involved in it, and not merely of the question of constitutionality of the law. The reason for this holding, as stated by the Court, was that in the clause of the same section which provided for an appeal or writ of error from the Circuit Court to the Supreme Court in cases in which the jurisdiction of the Court below is in issue, it is specifically directed that "the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision." And this Court inferred from the fact that there is no kindred limitation prescribed in regard to any of the other cases in which jurisdiction in the Supreme Court of appeals or writs of error is given by section five, that it was intended that the jurisciction of this Court should be co-extensive with that of the Court below.

And in the recent case of Stephens vs. Cherokee Nation, 174 U. S., p. 445, the Court say (page 482), referring to the decision in Horner vs. the United States:

"The only ground on which this Court held itself to be authorized to consider the whole merits of the case upon an appeal from the Circuit Court of the United States in a case in which the constitutionality of a law of the United States was involved, under section five of the act of March 3rd, 1891, c. 517, was because of the express limitation in another part of that section of appeals upon the question of jurisdiction; and there is no kindred limitation in the act now before us. Horner vs. United States, 143 U. S., 570-577.".

In the last named case this Court had occasion to consider the extent of its jurisdiction on appeals from the United States Courts in the Indian Territory under

the Indian Appropriation Act of July 1st, 1898, containing this provision :

"Appeals shall be allowed from the United States Courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said Court in other cases: *Provided*, That appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage ; and in cases decided subsequent thereto, within sixty days from final judgment ; but in no such case shall the work of the Commission to Five Civilized Tribes be enjoined or suspended by any proceeding in, or order of, any Court, or of any judge, until after final judgment in the Supreme Court of the United States. In cases of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible."

And the Court held :

"The distribution of jurisdiction made by the act of March 3rd, 1891, c-517, is to be observed in these cases; but the whole case is not open to adjudication, but the appeal is restricted to the constitutionality and validity of the legislation."

The Court, after reviewing the legislation respecting appeals from the courts in the Indian Territory and comparing the same with the corresponding provisions of the judiciary act of March 3rd, 1891, says :

"And when by the Act of July 1st, 1898, it was provided that 'appeals shall be allowed from the United States Courts in the Indian Territory direct to the Supreme Court of the United States, * * * under the rules and regulations governing appeals to said Court in other cases,' the legislation taken together, justifies the conclusion that the distribution of jurisdiction made by the act of March 3rd, 1891, was intended to be observed, namely, that cases falling within the classes prescribed in section five should be brought directly to this Court, and all other cases to the Appellate Court, whose decision, as the legislation stands, would in cases of the kind under consideration be final. We do not think, however, that the analogy goes so far, in view of the terms of the act of 1898, that in cases brought here the whole case would be open to adjudication. The matter to be considered on the appeal, like the appeal itself, was evidently intended to be restricted to the constitutionality and validity of the legislation."

Now the appeal in this case is taken under the following clause of section six of the judiciary act of March 3rd, 1891 :

"In all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

Certainly this language is no broader than that of the act allowing appeals from the courts of the Indian Territory quoted above, under which it was held, as we have seen, that the jurisdiction of this Court on the appeal was limited to a consideration of the questions

which alone gave the right of appeal. And it will be observed further that there is no clause in section six of the judiciary act which prescribes a limitation upon the questions to be considered by this Court, such as would enable this Court to draw an inference that there was an intention to confer a larger jurisdiction by the clause under which this appeal was taken, as was the case in Horner vs. The United States above cited.

We have not overlooked the last clause of the first paragraph of section six, by which it is provided that this Court, in cases where the jurisdiction of the Court of Appeals is made final, "may require that the whole record and cause may be sent up to it for its consideration, and thereupon it shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal." We submit, however, that the construction to be placed upon this clause is that, in the case there referred to, the Supreme Court shall decide the whole case and all the questions involved precisely as if the appeal had been taken from the Circuit Court to the Supreme Court instead of to the Court of Appeals. In other words, that this Court shall, in such cases, decide the whole matter in controversy precisely as it did before the act creating the Court of Appeals was passed. This clause was not intended to enlarge, by implication or inference, the jurisdiction of this Court. The general object of the act was to relieve this Court of a part of its appellate jurisdiction and to substitute therefor the appellate jurisdiction of the Court of Appeals. And on obvious principles, the whole act should be construed with reference to this main, controlling purpose.

American Construction Co. vs. Jacksonville R'y Co., 148 U. S., 372-382.

United States vs. American Bell Telephone Co., 159 U. S., 548-551.

We suggest further that in the case of Horner vs. The United States there was no question as to the distribution of appellate jurisdiction between this Court and the Circuit Court of Appeals. The question there presented arose under the fifth section of the act providing for appeals directly to the Supreme Court from the District Courts, or existing Circuit Courts.

This Court undoubtedly has jurisdiction to determine all questions involved in cases where the federal question exists only because of the character in which the parties sue or are sued. Such are suits brought by or against the United States, officers of the United States, receivers of national banks, corporations created by act of Congress and the like.

But there is a clear distinction between these cases and one in which, like the case at bar, the only federal question is presented by a claim made in the original bill under a specific act of Congress.

This Court in United States vs. American Bell Telephone Co., 159 U. S. 548-5S4, in referring to cases involving infringements of patents and the like say :

" Moreover, in those cases the subject matter is everything in respect of jurisdiction; while here the character in which the plaintiffs sue and the nature of the case are inseparably blended."

There is no such blending in this case. There is nothing in the character of the complainant or defend-

ant, or the claims arising under the contract or the mortgage which presents a federal question. Such question only arises because of the claim of the complainant iu the original bill that it had independently of the contract a right to maintain and operate its telegraph line on the Railway Company's property. This question is of course open for consideration on this appeal. But we submit that if this be determined adversely to the appellant there is an end of the case.

II. Our claim is that this contract is simply a personal contract of the Frankfort & Southeastern Railroad Company and is not binding upon the defendant.

But for the provisions of Article 8 of the contract (see page 7 of the Record) we submit that no one would ever have thought or claimed that this contract conveyed any interest in the land. That article provides as follows:

"The Railroad Company, so far as it legally may, hereby grants and agrees to assure to the Telegraph Company, the exclusive right of way on, along and under the line, lands and bridges of the Railroad Company, and any extensions and branches thereof, for the construction, maintenance, and operation and use of lines of poles and wires and underground or other lines for commercial or public uses or business, with the right to put up or construct or cause to put up or constructed from time to time such additional lines of poles and wires and underground or other lines as the Telegraph Company may deem expedient, and the Railroad Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions to the construction and maintenance of the lines and wires provided for herein, and the Railroad Company will not transport

men or material for the construction, maintenance, or operation of a line of poles and wire or wires or underground or other lines in competition with the lines of the Telegraph Company party hereto, except at and for the Railroad Company's regular local rates, nor will it furnish for any competing lines any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations.

Provided always that in protecting and defending the exclusive grants conveyed by this contract, the Telegraph Company may use and proceed in the name of the Railroad Company, but shall indemnify and save harmless the Railroad Company from any and all damages, costs, charges and legal expenses incurred therein or thereby."

It is obvious that this paragraph was only inserted for the purpose of creating a monopoly. Except for this, it is entirely unnecessary. Had this paragraph been omitted, there would be a complete valid operating contract. The right on the part of the Telegraph Company to use the Railroad Company's property while the contract is in force arises *ex necessitate*. It inheres in the very nature of the contract itself. The only effect of this article as well as the only purpose of it, is that the Railroad Company will make no similar contract with ano other telegraph company. But such a provision is entirely invalid.

Telegraph Company vs. Telegraph Company; 96 U. S. 1.

Telegraph Company vs. Telegraph Company, 9 Bliss. 72-3.

Telegraph Company vs. Telegraph Company, 23 Fed. Rep. 12.

Telegraph Company vs. Telegraph Company, 19 Fed. Rep. 660.

Merc. Trust Co. vs. Atlantic & Pac. Ry Co, 63 Fed. Rep. 910.

We claim therefore that the contract is to be construed exactly as if this clause had no existence whatever. We have been cited to the case of the Western Union Telegraph Company vs. Burlington & Southwestern Railroad Company, 11 Fed. Rep. page 1.

In that case it was held that similar paragraph in a contract between a railroad company and a telegraph company was void as contrary to public policy, but that the contract was capable of being construed divisibly and the remainder of the contract was valid.

But in this the case at bar the Telegraph Company is seeking to again subdivide this paragraph and in such wise as to give it the benefit of a right of way claimed to be granted thereunder, although it concedes that it can not have the exclusive right of way sought to be obtained ; and this notwithstanding the fact that as we have seen, the whole design of the Telegraph Company by the clause in question, was to procure a monopoly of the telegraph business over the Railroad Company's right of way.

We submit that this prragraph can not be split up in this way. The contract as a whole may be divisible. Paragraph eight may be omitted, but this paragraph is not divisible, and may be rejected as a whole without altering the contract in any essential respect.

III. But aside from the question of the validity of this clause it is clear from the contract taken as a whole that it is simply a personal contract between the parties.

It is an *operating* contract extending over a period of twenty-five years, with many obligations resting on the Railroad Company as well as the Telegraph Company. These mutual obligations as to operation are the essence of the contract, and they are all personal in their nature.

It cannot be claimed that these obligations are in any way binding upon this company e. g. the duty to reconstruct and maintain the poles, to transport free of charge men and materials therefor, to furnish space for batteries free of charge, to allow Telegraph Company to use Railroad Company's wire in case of interruption on the former's wire, to furnish operators, collect tolls, make monthly statements and account for receipts to Telegraph Company, to transport free of charge employes of Telegraph Company, to furnish lights and fuel at stations for accommodation of Telegraph Company, to indemnify Telegraph Company for damage arising from error in transmission of messages, etc. These and corresponding obligations on the part of the Telegraph Company are really the whole of the contract, which as we have said is entirely complete without the eighth article. But these do not create any lien upon this property. The purchaser at judicial sale is not bound by them. The contract is quite similar to that in—*Express Company vs. Railroad Company, 99 U. S. 191*, to which we call the careful attention of the Court. The syllabus is as follows:

"A contract between A, a railroad company, and B, an express company, stipulated that B should lend A

$20,000 to be expended in repairing and equipping its road, and that A should grant to B the necessary privileges and facilities for the transaction of all express business over the road, the sum found to be due A therefor upon monthly settlement of accounts. to be applied to the payment of the loan and the interest thereon. The contract was to continue for one year, when, if the money with interest thereon was not paid, it was to continue in force until payment should be made. After B had advanced the money, and entered upon the performance of the contract, A conveyed all its property, including its franchise, to C, in trust to secure the payment of certain bonds issued by it. Default having been made in their payment, C brought a foreclosure suit, and obtained a decree placing the road in the hands of a receiver and ordering its sale. The receiver having declined to carry out the contract with B, the latter, with the consent of the Court, brought its bill in equity for specific performance against him, A and C. *Held* 1, That the receiver is the only necessary party defendant. 2. That the transaction between the companies is not a license, but simply a contract for transportation creating no lien, the specific performance whereof would be a form of satisfaction or payment, which the receiver can not be required to make."

The contract in that case is set out in *extenso* on pp. 192-193-194, and on pages 200 and 201, the Court says:

"There is another objection to the appellant's case which is no less conclusive.

The road is in the hands of the receiver appointed in a suit bought by the bondholders to foreclose their mortgage. The appellant has no lien. The contract neither

expressly nor by implication touches that subject. It is not a license as insisted by counsel. It is simply a contract for the transportation of persons and property over the road. A specific performance by the receiver would be a form of satisfaction or payment which he cannot be required to make. As well might he be decreed to satisfy the appellant's demand by money, as by the services sought to be enforced. Both belong to the lienholders, and neither can thus be diverted."

This contract is an *entirety* and if enforced at all must be enforced in all its parts. Indeed that is the prayer of the bill.

If it could be otherwise claimed that there was a substantive grant of an interest in the land, it seems clear that it is only for such length of time as the contract is operative and binding. This is in accord with the language of Article 12, as to the duration of the contract. This is as follows: "The provisions of this agreement shall be and continue in force for and during the term the twenty-five (25) years from the twenty-fifth day of September, 1890; and shall continue after the close of said term until the expiration of one (1) year after written notice shall have been given after the close of said term by either party to the other of an intention to terminate the same."

Frem the foregoing we think it clear that this contract is not binding upon the present company. It is not claimed that the personal obligations of The Frankfort & Southeastern Railroad Company or its successor, The Toledo, Ann Arbor & North Michigan Railway Company, are as such binding upon the present Company.

It is ~~agreed~~ argued; however, that the entire contract runs

with the land so as to bind the defendant company, and this because the defendant know of the existence of the contract and of the rights claimed by the Telegraph Company under it. If in fact the obligations of the contract are covenants running with the land, the knowledge of the defendant of its existence might be material. If, however, the contract is a personal contract, then defendant is not bound unless it assumed its obligations in some way. But counsel does not point out any of these covenants which is not purely personal in character.

Indeed they are, as we have seen, the whole of the contract. The right of way is simply incidental. As was said by the Circuit Court below in paragraph 5 of the opinion "it (the right of way) has no foundation upon which it could last independently of the personal covenants."

IV. There is no ground for any claim that the conduct of defendant makes the contract binding on it. It repudiated the contract from the outset, and notified the Telegraph Company that it was not bound by it. Its action in disconnecting the wires and taking possession of the line was a distinct disclaimer of obligation and calculated to forestall any claim that it had ratified or adopted the contract. If it exceeded its legal rights in taking possession of personal property of the Telegraph Campany (either purposely or through a mistaken notion that by the foreclosure it had become the owner thereof) it has been and is willing to make reparation. Such possession was very short-lived and of small consequence. The Court will hardly hold that it adopted the contract unless it intended to adopt it or its acts are inconsistent with any other intention. As a matter of fact its intention was exactly the reverse and its acts

were calculated to express its intention to repudiate the obligation. In its cross bill (paragraph 6), the defendant disclaims any interest in the wires and insulators, but claims ownership in the poles (not however under the contract) and expresses its willingness to have an accounting. We do not ask to use any property of the complainant, but are willing to have complainant remove all its property as the Court below decreed it had the right to do.

The case differs from the case of *Western Union Telegraph Company vs Western & Atlantic R. R. Co.* in 91 U. S., 283, in that there the railroad sought to retain the benefits but repudiated the obligations of the contract. In the case at bar we want neither. We ask simply the free use of our own property.

V. Aside from the foregoing, however, we contend that inasmuch as the contract between the Railroad Company and the Telegraph Company was executed after the mortgage of the Railroad Company, all rights of the Telegraph Company under the contract ceased npon the foreclosure of the mortgage, the sale of the property, and the entry of the purchaser into possession. Certain it is that even assuming that the Telegraph Company under the contract was the grantee of an easement in the property, its position is no better than that of a lessee of the mortgagor under a lease executed subsequent to the mortgage, and in such case it seems to be well settled that the rights of the lessee would be extinguished by the foreclosure and sale of the property.

It has been suggested, however, that this rule does not prevail in Michigan, because it is there held that a

mortgage is simply a lien upon the property and it is provided by statute that no action of ejectment shall be maintained by a mortgagee or his assigns or representatives, for the recovery of the mortgaged premises until the title thereto shall have become absolute upon foreclosure of the mortgage. But, as was pointed out by the Circuit Court of Appeals, the only effect of this statute is to take away the remedy of the mortgagee by way of entry or ejectment; it does not affect his rights as against those holding under the mortgagor. Whenever the mortgagee, or his assigns, has acquired lawful possession of the mortgaged premises, either by entry or by foreclosure and sale, the rights of the mortgagor are extinguished. And inasmuch as the right of the grantee of the mortgagor (either a lessee or holder of an inferior easement) is subject to being devested by by the mortgagor's acquiring possession of the mortgaged premises, it follows that the rights of such grantee are extinguished upon the happening of that event. If this be the law, the fact that the Western Union Company was not a party to the foreclosure suit makes no difference so far as the rights of the parties are concerned. Had that company been made a party, it would have been cut off by the judgment in the foreclosure suit; but its possessory rights are just as effectually extinguished by the sale and entry of the purchaser into possession.

It is possible that some right of redemption may exist which was not foreclosed. But this is not a bill to redeem, but one for the specific performance of the contract. In the states of Iowa, California and New York, the relations between mortgagor and mortgagee appear to be substantially the same as in Michigan. Yet in each of those states it has been held that the

rights of a lessee of the mortgagor, holding under grants subsequent to the mortgage, are entirely subordinate to the rights of the mortgagee and his assigns and are extinguished by the foreclosure of the mortgage and sale of the premises.

We cannot do better than quote from the able opinion of the presiding judge of the Circuit Court of Appeals in this case upon this point. See 90 Fed. Rep., pages 384, 385:

"In Iowa by statute, the mortgagor retains the legal title and the right of possession until foreclosure and sale. Code Iowa, 1873, page 357; Jones, Mortgages, section 29. In Downard vs. Groff, 40 Ia., 597, A. sued G, on a covenant of general warranty. G. was the assignee of a mortgage and at foreclosure bought in the property and sold with warranty to A. The breach assigned was that B., the mortgagor, after the execution of the mortgage, had leased the land to one L., and that L., who had not been made a party to the foreclosure proceeding, had refused to yield possession, and had taken the crops growing at the time of the sale. It was held that no breach was shown, because the purchaser had the right to evict L. and to take the emblements.

The Court said: 'It may be conceded that since Leroy, the tenant, was in possession under a lease from the mortgagor, and was not made a party to the foreclosure suit, that he is not bound or affected by the judgment therein. But this fact does not alter the rights of the mortgagee, or of the purchaser under the foreclosure sale, as against such tenant. It only affects the remedy, and defeats the use of the judgment as

evidence. By the lease from Dorstal, the mortgagor, to Leroy, the latter acquired no greater rights in the premises than the mortgagor had. The tenant stands exactly in the situation of the mortgagor. As between the mortgagor and mortgagees, the latter, by the foreclosure and sale, became entitled to the possession of the premises, and to all the crops then growing thereon. The right of the purchaser was not and could not be defeated by reason of the lease, or by the fact that the possession was in, or that the crops were grown by the lessee. The right to the possession, and the right to the growing crops, passed to the purchaser. If the tenant had been made a party to the foreclosure suit, the possession and the crops could have been delivered to him by process under that judgment; but, since he was not made a party thereto, he cannot obtain the remedy except by some other action. The purchaser's rights, however, are just the same as they would have been if the tenant had been made a party. It follows, therefore, that Groff, by his purchase and sheriff's deed, became the absolute owner of the premises, including the crops growing thereon; and by his conveyance he invested the plaintiff herein with that ownership, and she might by proper action, have enforced her rights as such owner against the tenant. Her failure to do so cannot give her any cause of action as against the defendant, the grantor.'

In California the title and right of possession of the mortgagor continues until foreclosure and sale. McMillan vs. Richards, 9 Cal., 365; 1 Jones, Mortg., section 20. In McDermott vs. Burke, 16 Cal., 580, the action was ejectment by the purchaser at a mortgage foreclosure sale against the lessees under a term of five

years, granted by the mortgagor after the execution of the mortgage. Chief Justice Field, who had delivered the opinion in McMillan vs. Richards, *supra*, also delivered the judgment of the Court in this case. He said :

'We are of the opinion that the legal rights of the lessee were extinguished by the proceedings in the foreclosure suit and sale following the decree thereon. A mortgagor cannot make a lease which will bind his mortgagee, where the lessee at the time had notice of the mortgage, either actual or constructive. The interest of the lessee in such case is dependent for its duration, except as limited by the terms of the lease, upon the enforcement of the mortgage. So long as the mortgage remains unenforced, the lease is valid against the mortgagor, and in this state against the mortgagee ; but with its enforcement the leasehold interest is determined. There is no privity of contract or of estate between the purchaser, the decree of sale and the tenant. The purchaser may therefore treat the tenant as an occupant without right, and maintain ejectment for the premises. He cannot, for the want of such privity, count upon the lease, and sue for the rent or the value of the use and occupation. The relation between the purchaser and tenant is that of owner and trespasser, until some agreement, express or implied, is made between them with reference to the occupation. Until then, both are equally free from any contract obligations to each other. The tenant is not bound to attorn to the purchaser, nor is the latter bound to accept the attornment, if offered. The purchaser may prefer to have the possession, and the tenant may also prefer to surrender it. * * * The error of the plaintiff arises from the misapprehension of the rule as to the

parties necessary to the foreclosure of a mortgage. The rule only requires, as parties, those who are beneficially interested in the claim secured or in the estate mortgaged. The tenant is not thus interested in the claim. He is not entitled to its proceeds when collected, or to any portion of the proceeds. Nor is he thus interested in the estate mortgaged ; that is, in the title which is pledged as security. He has not succeeded to such estate or any portion of such estate. He does not stand, therefore, in the position of a purchaser. The estate remains in his lessor. He has only a contingent right to enjoy the premises. The right of the lessor to the possession ends with the sale of the premises, or, rather with the deed by which the sale is consummated. The right of the tenant to such possession depends upon that of the lessor, and goes with tt.'

In New York no action of ejectment can be sustained by a mortgagee for the recovery of the mortgaged premises, and the mortgagor has a right to sell or lease subject to the rights of the mortgagee. In Simers vs. Saltus; 3 Denio, 214, the suit was by the mortgagor on a covenant of a lease for rent. The defense was eviction. The facts were that the lessor,being the owner in fee of the land, had given a mortgage upon the same before he made the lease upon which suit was brought, and that the mortgagee had foreclosed the property, and brought it to a sale; that the purchaser had said to the tenant that he might continue to occupy the land, and the contention was that, by such consent, the lessee continued bound under the lease. The court held however, that, by the foreclosure and sale, the lease of the tenant had been extinguished. The Court said: —

'If the mortgagor, subsequent to the mortgage, lease

the premises, the mortgagee cannot distrain or sue for rent, because there is no privity of contract or of estate between the mortgagee and tenant, unless the tenant attorn to the mortgagee after the mortgage has become forfeited, which he may do. * * * After foreclosure and sale of the mortgaged premises, in possession of a lessee of a mortgagor, under a lease subsequent to the mortgage, the lease is considered a wrongdoer, and is not entitled to notice to quit; and against him an action of trespass will lie by the purchaser for taking and carrying away the crops. Lane vs. King, 8 Wend., 584 ' "

It has been suggested that the Court has the power to so frame its decree as in some way to enable the Telegraph Company to effect an equitable condemnation of the property of the Railroad Company, compelling the Railroad Company in the meantime to perform this contract by mandatory injunction. We submit that the Court has no such power. Our attention has been called to the case of McElroy vs. Kansas City, 21 Fed. Rep., 257 and the decision of Circuit Judge Brewer in that case. The complainant in that case was the owner of a lot on the corner of two streets in Kansas City. The grade had been established by the city by ordinance, the carrying into execution of which would leave the lot of the complainant many feet above one of the streets and seriously damage the value of the property. While under the Statutes of Missouri it was provided that private property should not be taken or damaged for public use without just compensation, it appeared that no provision had been made by the legislature by which the amount of damages in such cases could be ascertained, and it was contended by the complainant that the city was powerless to proceed as it

had no statutory power to condemn, and that it only remained for the Court to grant a perpetual injunction. After a consideration of the case, the Court ordered that the defendant be restrained from grading the street upon the filing by the complainant of a bond and stipulation to accept such damages as might be awarded by a board of commissioners appointed by the Court.

We have also cited the Elevated Railway cases decided by the New York Court of Appeals. In these cases the complainants were abutting property owners who sought to have an injunction restraining the operation of the road, and in some of the cases it was held that the Court could suspend the operation of an injunction long enough to permit the Railway Company to condemn and pay for the property interests taken, or damaged, by the construction and operation of the road. It is apparent that these cases have no application to the case at bar. In all of them it will be noticed that it was the aggrieved property owner who was invoking the aid and protection of a Court of Equity and not, as in the case at bar, the party claiming the right to an equitable condemnation. In the present case, the Telegraph Company, having been ousted from possession, reconnected its wires by force and then appealed to a Court of Equity to maintain it in possession by order of injunction, and now suggests that the Court may enable it equitably to appropriate the property. We have seen no case which would warrant any such proceeding. In the Kansas case Judge Brewer emphasized the principle that in considering an application for an injunction, the Court would weigh the respective interests of the parties and the injuries which might result from the granting of the injunction and if it was apparent that the complainant could be fully protected in some other way, and

especially if the public would be greatly inconvenienced by the injunction prayed for, the Court might withhold the relief.

The Court also laid stress upon the fact that the city had an ultimate right to grade the street, and was only prevented from ascertaining and paying damages (the condition of the exercise of the right) by the fact that no tribunal had been created for that purpose. It seems very clear to us that it would be a perversion of the principles enunciated in that case to apply them to the case at bar. Here the Telegraph Company has no ultimate right, nor any right, to occupy the railway property without the consent of the Railroad Company. Its action in forcibly taking possession was wrongful and it is in no position to appeal to a Court to maintain this wrongful possession. The suggestion that it is willing to pay comes too late—the bill was evidently not framed on any such theory. As we said at the outset, it is in effect a bill for the specific performance of the contract, based upon the mistaken theory that it is binding upon the defendant.

We submit, therefore, that the decrees of the Court below were right and should be affirmed.

VI. Since the foregoing was prepared we have received a copy of appellant's brief. Counsel are in error in stating (page 7, brief) that the Circuit Court of Appeals affirmed the decree of the Circuit Court "on the same ground."

In fact, the decrees of the two courts below were based on different grounds. The Circuit Court was of opinion that the easement (if any there was) of the Tele-

graph Company "was necessarily incident to the personal covenants, but it has no foundation upon which it could last independently of the personal covenants." (Record, p. 29.)

This, of course, was quite independent of the prior mortgage and the rights of defendant as purchaser under the mortgage. The Circuit Court of Appeals, on the other hand, without undertaking to decide whether or not the contract created an interest in the land or was purely personal in its character, held that in any event the rights of the Telegraph Company terminated with the foreclosure and sale and entry of purchaser into possession. (Record, pp. 39 *et seq.*)

The case of the City of Los Angeles vs. Los Angeles City Water Company, 124 Cal., 368, does not help the appellant. There the City and the Water Company were the original parties to the contract and bound by its terms. The city had agreed to *pay for* the improvement at the end of the term. It refused to perform this obligation but came into court with an application for an injunction and receiver to prevent the Water Company from receiving payment of water rates after the expiration of the period fixed by the contract. The application was rightfully refused.

In the case at bar, the Railroad Company is under no obligation to pay for the improvements. It does not want them and is willing and anxious to have the Telegraph Company remove its property.

Counsel say in their brief (pps. 17, 18):—

"If the eighth clause had never been in the contract,

still, we insist that the remaining provisions of the contract would clearly evidence an intent to grant a right to construct a telegraph line along the railway, and would constitute the grant of such right. The eighth clause of the contract is not so much a grant of the right of way along the railroad, (for this is necessarily implied in the remaining provisions for the construction, maintenance and operation of ths telegraph line), but it is a specific stipulation in the nature of a regulation of the right of way granted — a limitation on the power of the railway company to grant to other companies a similar right. As we have said, if this clause be entirely stricken from the contract, a right of way along the railway is necessarily implied from the other provisions, and the express purpose of the parties in entering into the contract. The Circuit Court held that the grant of right of way to the Telegraph Company was merely incidental to the mere personal agreement of the parties, and to enable that personal agreement to be carried out."

This, we think, is a fatal though a forced concession. For without the eighth clause this contract is obviously purely personal and the conclusion of the Circuit Court was clearly correct. (p. 18 of brief.)

Nor does the reference to the Michigan statute relating to telegraph companies help out the case. That statute does not confer the right of eminent domain, and if it did it applies only to Michigan corporations. The most that can be said is that the Telegraph Company had a right to contract with the Railroad Company for the use of the latter's property, and the State of Michigan could not prevent its so doing.

Nor was there anything preventing it getting the consent of the mortgagee to the contract in such wise as to have protected its rights in the event of foreclosure and sale.

The case of Phillips vs. Thompson, 1 Johns, Ch. 131, was a case where plaintiff had allowed county commissioners to take possession of his property for public uses under an oral contract for compensation. He filed a bill for specific performance. In this he failed because the contract was void under the statute of frauds. Yet the Court retained his bill and awarded an issue to assess damages, because he was clearly entitled to compensation and his remedy at law was doubtful or inadequate.

But there the possession was by agreement with the plaintiff. We have no contract with the Telegraph Company. In North Hudson R. R. Co. vs. Boraem, 28 N. J. Eq., 450, the suit was brought to foreclose a purchase money mortgage. A railroad company which had entered into possession of part of the mortgaged premises by consent of the mortgagor, under an agreement to purchase, was made a party. It had the right to condemn. And the Court held that the value of the land appropriated by it could be ascertained by proceedings to condemn or by reference to a master.

But the case turned, as did the other cases cited by counsel on this point, upon the question whether the value of improvements placed upon the land by a railroad company, which had entered without any contract or any contract binding upon the mortgagee, could be considered in estimating the compensation to be paid by the railroad company.

With all deference to distinguished counsel for the

Telegraph Company, it seems to us that these cases do not reach the point in this case. Their client made a contract with The Frankfort and South Eastern Railroad Compay, under which it obtained a temporary right to occupy the property of that Company. That property was subject to a mortgage of which the Telegraph Company had notice. The Telegraph Company did not obtain the consent of the mortgagee, nor has it any contract or agreement with the purchaser. It has no power to condemn and no right to occupy save by agreement with the owner. Being properly ousted, it regained possession by force and retains it by grace of a Court of Equity, and now seeks to compel the present Railroad Company to carry out a contract it neither made nor assumed, and against its will.

No appeal to public interests can warrant such an invasion of private rights.

Respectfully submitted,

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